IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973
No. ~~73~~ 1768

MAY 25 1974

ED DUFF, Etc.,

PETITIONER,

-VS-

ROGER FAIN,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS, FIFTH CIRCUIT

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JURISDICTIONAL STATEMENT

This petition is from the opinion rendered on December 11, 1973, petition for rehearing en banc denied March 4, 1974, by the United States Court of Appeals, Fifth Circuit, which prohibits the State of Florida from trying Respondent. Petitioner submits this statement tc show that this Court has jurisdiction and that substantial federal questions are presented.

OPINIONS BELOW

State v. R.E.F., 251 So.2d 672 (Fla. App. 1971), R.E.F. V. State, 265 So.2d 701 (Fla. 1972). The opinion of the United States Court of Appeals, Fifth Circuit, is reported in 488 F.2d 218, and is included herein as Appendix A. The opinion denying the petition for rehearing en banc by the United States Court of Appeals, Fifth Circuit, filed March 1, 1974, is not yet reported and is included herein as Appendix C. The opinion of the United States District Court, Middle District of Florida, is included herein as Appendix B.

JURISDICTION

The jurisdiction of this Court to enter the writ of certiorari is invoked pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On November 12, 1970, Roger Fain, then aged sixteen years and nine months, was arrested by Ormond Beach police officers for the alleged rape the day before of Mary Frances Oswald in Volusia County, Florida. Five days later, a counselor of the juvenile court system filed a petition in juvenile court alleging that Fain was a delinquent child by reason of having assaulted and raped Mrs. Oswald. On November 23, 1970, a hearing was held in the Volusia County Juvenile Court, during which an assistant state attorney appeared and

urged the judge to waive jurisdiction and certify the case to the circuit court. After hearing argument on this question, the judge declined to waive jurisdiction, found Fain delinquent and committed him to the division of Youth Services for an indeterminate period not to extend beyond his twenty-first birthday.

On December 1, 1970, the State Attorney for the Seventh Judicial Circuit urged the juvenile court judge to stay the issuance or execution of its order of commitment; the judge did not do so. The next day, an indictment was returned alleging the same acts on which the delinquency adjudication was based. Two weeks later, on December 17, 1970, the state attorney urged the juvenile court to relinquish jurisdiction.

In the circuit court, Circuit Judge Melton of the Seventh Judicial Circuit, dismissed the indictment against Fain on January 7, 1971, on the grounds of former jeopardy. The State appealed to the First District Court of Appeal, which reversed Judge Melton's ruling on August 17, 1971. State v. R.E.F., 251 So.2d 672 (1971). The Supreme Court of Florida affirmed the court of appeal. R.E.F. v. State, 265 So.2d 701 (1972). Fain filed a petition for writ of habeas corpus in the United States District Court, Middle District of Florida, and a hearing was held before the said court on November 21, 1972. On January 15, 1973, the district court issued the writ requested by Fain. The State filed a notice of appeal February 7, 1973. On December 7, 1973, the United States Court of Appeals, Fifth Circuit, affirmed

the United States District Court in a 2-1 opinion wherein the Court held that the district court properly exercised its jurisdiction; that Fain had been subjected to double jeopardy; and that the actions of the State of Florida were "fundamentally unfair."

QUESTIONS PRESENTED

POINT I

DID THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ERR IN AFFIRMING THE DISTRICT COURT'S EXERCISE OF JURISDICTION IN THIS STATE COURT PROCEEDING.

POINT II

DID THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ERR IN HOLDING A JUVENILE DELINQUENCY PROCEEDING CONSTITUTED A BAR TO A SUBSEQUENT CRIMINAL PROCEEDING UNDER THE DOUBLE JEOPARDY PROVISIONS OF THE UNITED STATES CONSTITUTION.

POINT III

DOES PROSECUTING RESPONDENT FOR THE CRIME OF RAPE VIOLATE FUNDAMENTAL FAIRNESS.

REASONS FOR GRANTING WRIT

POINT I

DID THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ERR IN AFFIRMING THE DISTRICT COURT'S EXERCISE OF JURISDICTION IN THIS STATE COURT PROCEEDING.

ARGUMENT

The issue here is whether the district court properly entertained the petition for writ of habeas corpus prior to trial in the state court under 28 U.S.C. §2241 (c)(3).

Petitioner urges the district court erred in issuing the writ of habeas corpus because in doing so it acted as a pre-trial motion forum and there were no exceptional circumstances which warranted federal interference with the judicial administration of Florida's criminal laws.

In Braden v. Thirtieth Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), this Court upheld the United States District Court's exercise of habeas corpus jurisdiction before a conviction was entered because it believed Kentucky had an affirmative constitutional obligation to bring a man to trial promptly. In Braden, supra, this Court made it clear, however,

that 28 U.S.C. 2241(c)(3), should not be used as a means to litigate a federal defense to a criminal charge before conviction, saying:

> "We emphasize that nothing we have *said would* permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Braden, at 451.

The Court in Braden, supra, noted that 28 U.S.C. 2241(c)(3), should be applied to state court proceedings only in exceptional circumstances. In explaining the exceptional circumstance that entitled Respondent to 28 U.S.C. 2241(c)(3) relief, the United States Court of Appeals wrote the reason as:

> "...being protected from having to undergo the rigors and danger of a second-illegal-trial." Roger Fain v. Ed Duff, Etc., Appendix A, p. 11.

Thus, the United States Court of Appeals admits the district court was a acting as a pre-trial motion forum and could grant relief solely to protect Respondent from standing trial. In Younger v. Harris, 301 U.S. 37 (1971), this Court wrote:

> "No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground

> for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid." Younger, at 47.

The United States Court of Appeals, Fifth Circuit, should have exercised 28 U.S.C. 2241(c)(3) to enjoin Florida's prosecution only to prevent irreparable injury, or on a finding that exceptional circumstances as defined by this Court necessitated it acting as a pre-trial motion forum, Ex parte Royall, 117 U.S. 241 (1886). Since Respondent has been released from custody and there is no restraint on his liberty, the only type of injury he faces is the cost, anxiety, and inconvenience of having to stand trial. Petitioner contends such inconveniences do not expose Respondent to "irreparable" harm:

> "Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single prosecution." Younger, at 46.

There is nothing to suggest he will lose his freedom while awaiting trial and because the jury may acquit Respondent thus eliminating any possible violation

of a federally protected right, he faces no irreparable harm at this time which justified 28 U.S.C. 2241(c)(3) intervention on the basis of exceptional circumstances. The Court of Appeals misconstrued the case of Braden v. Thirtieth Judicial Circuit Court of Kentucky.

In Braden, supra, this Court felt "exceptional circumstances" existed that justified federal intervention in the judicial administration of Kentucky's criminal law because Kentucky would not try the petitioner.

> "Moreover, petitioner made no effort to abort a state proceeding or to disrupt the orderly functioning of state judicial processes. He comes to federal court not in an effort to forestall a state prosecution, but to enforce the Commonwealth's obligation to provide him with a state court forum." Braden, at 450.

No such "exceptional" circumstance exists in this case, and Respondent's efforts in federal court were solely directed toward evading a trial in Florida. The State of Florida stands ready to try Respondent--indeed, has continuously attempted to do so--and questions how Respondent's assumption that a jury will convict him and his belief that he is immune from prosecution produce the circumstances that make this case special or exceptional to justify the federal court interfering with the judicial administration of Florida's criminal laws.

The district court improperly exercised its jurisdiction and the United States Circuit Court of Appeals, Fifth Circuit, misconstrued and misapplied Braden by affirming the district court. For these reasons a substantial federal question exists as to whether the lower courts properly followed the prior decisions of this Court and acted as a pre-trial motion forum by invoking 28 U.S.C. 2241(c)(3) before a judgment and sentence was rendered in this state court proceeding.

POINT II

DID THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, ERR IN HOLDING A JUVENILE DELINQUENCY PROCEEDING CONSTITUTED A BAR TO A SUBSEQUENT CRIMINAL PROCEEDING UNDER THE DOUBLE JEOPARDY PROVISIONS OF THE UNITED STATES CONSTITUTION.

ARGUMENT

Another substantial question presented was whether the Double Jeopardy Clause of the Fifth Amendment is a bar to Florida trying Appellant in a criminal court for rape after he was adjudicated a delinquent child in a civil juvenile delinquency hearing pertaining to the same rape.

In One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972), the court recently wrote:

"Congress may impose both a criminal and civil sanction in respect to the same act or omission for the Double Jeopardy Clause prohibits merely punishing twice, or a second time to punish criminally for the same offense."

Section 39.09, Florida Statutes, provides for a civil hearing to determine if a youth under the age of seventeen has violated a Florida law. The purpose of these delinquency hearings is aimed at rehabilitating the offender.

Section 794.01, Florida Statutes, makes it a felony of the first degree to rape a person. One who violates this law may be punished in the State penitentiary for life. The later statute is aimed at punishment while the former statute contemplates rehabilitation.

Petitioner's position is that juvenile proceedings are not aimed at punishing and therefore not criminal prosecutions to which the double jeopardy clause applies. The State of Florida would cite Mr. Justice White's concurring opinion in McKeiver v. Pennsylvania, 403 U.S. 528 (1971):

"The criminal law proceeds on the theory that defendants have a will and are responsible for their actions... Guilty defendants are considered blameworthy; they are branded and treated as such, however, much the State also pursues rehabilitative goals in the criminal justice system. For the most part, the juvenile jus-

> tice system rests on more deterministic assumptions. Reprehensible acts by juveniles are not deemed the consequence of nature and malevolent choice but of environmental pressures (or lack of them) or other forces beyond their control." McKeiver, at 552
>
> "Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others." McKeiver, at 552

In McKeiver, supra, this Court plainly said a juvenile proceeding was not a criminal proceeding, because these proceedings do not impose punishments. Indeed, if it was a "criminal prosecution", Duncan v. Louisiana, 391 U.S. 145 (1968) would have required this Court to hold McKeiver was entitled to a jury trial since his incarceration could have exceeded six months.

Section 794.01, Florida Statutes, is aimed at punishment while Chapter 39, Florida Statutes, contemplates rehabilitation. In Helvering v. Mitchell, 303 U.S. 391 (1938), the court said:

> "Unless [the] sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for in criminal prosecution is not applicable." Helvering, at 398-399.

The Helvering, supra, doctrine as applied in One Lot EmeraldCut Stones, supra, requires two punishments, two criminal proceedings before the Double Jeopardy Clause of the Fifth Amendment is a bar to the second proceeding. A juvenile proceeding which contemplates rehabilitation and is not a criminal prosecution cannot therefore be a bar to a criminal proceeding by virtue of the Fifth Amendment to the United States Constitution.

While the fact that a practice is followed by a large number of states is not conclusive in a decision as to whether a state practice accords with a constitutional right such a fact is plainly worth considering in determining whether the state practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. In McKeiver, supra, the Court states:

> "It therefore is more than a passing interest that at least 28 states and the District of Columbia by statute deny the juvenile a right to a jury trial in cases such as these." McKeiver, at 548

McKeiver, supra, illustrates the fact that it is worth considering a practice followed by a large number of states before considering whether that practice offends some principle of justice. Therefore, in an effort to emphasize that many states do not consider it wrong or offending some principle of justice to deny Respondent the right against double jeopardy

he asserted in State v. R. E. F., 251 So.2d 672 (Fla.App.1st 1971), the State of Florida would respectfully call this Court's attention to Moquin v. State, 140 A.2d 914 (Ct. of App. Md. 1958); Johnson v. State, 238 A.2d 286 (Myd.Ct. of Spec.App. 1967); In re Santillanes, 138 P.2d 503 (N.Mex. St.Ct. 1943); In re Holmes, 109 A.2d 523 (Penn.S.Ct. 1954), cert.den. 348 U.S. 973 (1955); People v. Silverstein, 262 P.2d 656 (Calif. 2d DCA 1953); State v. Smith, 25 N.W.2d 270 (N.Dakota S.Ct. 1946); In re McDonald, 153 A.2d 651 (Dist. of Columbia Municipal Ct. of App. 1959).

The above courts feel, as Florida, that double jeopardy does not attach to a criminal trial subsequent to a juvenile adjudication. As was noted by the court in In re McDonald, 153 A.2d 651 (Dist. of Columbia Municipal Ct. of App. 1959):

> "Double Jeopardy as used both in the constitution and in its technical sense at common law is applied only to criminal prosecutions. 2 Warton's Criminal Evidence, 650 (12th ed., 1955)."

Seven states have rendered opinions holding that a juvenile proceeding is not a bar to subsequent criminal proceedings. Twelve Florida Appellate and Supreme Court Justices do not believe a juvenile hearing is a bar to a subsequent criminal proceeding. The United States Court of Appeals for the Fifth Circuit believes a juvenile hearing is such a bar. The Court of Appeals, in order to reach this result, had to conclude a juvenile proceeding was a criminal prosecution--a result clearly contrary to

McKeiver--thereby creating a substantial federal question which can only be resolved by this tribunal.

POINT III

DOES PROSECUTING RESPONDENT FOR THE CRIME OF RAPE VIOLATE FUNDAMENTAL FAIRNESS.

ARGUMENT

Prosecuting Respondent for rape in a criminal court after the juvenile court circumvented the Grand Jury's intention to indict and thus remove Respondent from the jurisdiction of the juvenile court in no way violates fundamental fairness.

Section 39.02(6)(a), Florida Statutes, of the Juvenile Court Act permissively authorizes a juvenile court judge to waive its jurisdiction of a proceeding brought against a juvenile 14 years of age or older to the criminal court if the act forming the basis for the alleged delinquency would constitute a felony under the laws of Florida. Section 39.02(6)(c), Florida Statutes, provides that when an indictment is returned by the grand jury charging a child of any age with a violation of Florida law punishable by life imprisonment, the juvenile court shall be without jurisdiction, and the child shall be handled in every respect as if he were an adult.

In the case sub judice, the juvenile hearing was conducted six days from the date on which the petition of the juvenile counselor was filed in the court. The Assistant State Attorney appeared at this hearing and then informed the juvenile judge that the Grand Jury would consider indicting Appellant when it met the next week. The Assistant State Attorney asked the juvenile judge not to act until the Grand Jury could deliberate in this matter. In an abuse of discretion, the juvenile court judge ignored the Assistant State Attorney's request and the obvious legislative intent, and found Respondent to be a delinquent child. The trial judge arbitrarily bestowed a benefit upon Respondent by not waiting a reasonable period of time to allow the Grand Jury to consider the matter. Twelve days later, Respondent was indicted for rape. At this time the juvenile court judge was requested to give up custody of Respondent which he again refused to do. Thus, Respondent's attorney and the juvenile court judge circumvented the Grand Jury and Respondent spent two years at the juvenile detention center in Marianna, Florida, rather than be tried and punished like all other sixteen year-old youths indicted for rape.

Now arises the question of whether it is fundamentally unfair to try Respondent as an adult for rape. In McKeiver v. Pennsylvania, supra, this Court noted that fundamental fairness has never been defined in juvenile case decisions. The court said that fundamental fairness must be determined on a case by case basis.

In the case sub judice, there can be no doubt that Appellant received a benefit that no other juvenile accused of a capital crime in Florida receives. The State of Florida has no qualm with granting Appellant a reduction in his sentence of two years for the time he spent at the juvenile detention center in Marianna, Florida. What the State of Florida questions is how it can be accused of being unfair to Respondent to ask him to face the penalty all others his age receive for rape.

The Circuit Court of Appeals, Fifth Circuit, relied on its former opinion of Hultin v. Beto, (5th Cir. 1968) 396 F.2d 216 , in holding a second prosecution of petitioner would violate fundamental fairness. Hultin, supra, arises out of a Texas case in which that petitioner was adjudged a delinquent child for a murder he committed before he reached seventeen years of age. After reaching the age of seventeen and after having been in custody for several years, Texas attempted to try that petitioner as an adult for the same murder.

Hultin, supra, differs from the case sub judice in three substantial ways:

(1) In Texas, the law is such that a youth under seventeen years of age can never be prosecuted as an adult.

(2) In Hultin, supra, the prosecuting attorney agreed to and participated in the juvenile proceedings which Texas two years later attempted to re-open.

(3) Texas never filed an information nor indictment against petitioner until he turned seventeen years of age, thus evading the intent of the Texas Legislature.

The Circuit Court of Appeals, Fifth Circuit, in an attempt to make this case conform with its Hultin, supra, decision reasoned that since a juvenile court judge acts for the state, he plays the same role as the state attorney. Ed Duff v. Roger Fain, A, p. 16. The court used this unreasonable analogy to show that the state played a role in the delinquency proceedings at bar similar to the role played by the state attorney in the Hultin, supra, juvenile proceeding. It was wrong for the Court of Appeals to support its decision on this incorrect comparison and Petitioner contends its case is in no way similar to Hultin, supra, as the lower court believes. The state attorney is an advocate for and represents the State whereas the trial judge is or ought to be a "neutral" magistrate concerned with applying the law as written.

Petitioner has noted to this Court that, unlike Texas, the law of Florida permits prosecution in criminal court even if the person is a youth. Age alone does not determine the matter, but in certain serious cases the nature of the crime is considered. Moreover, Florida did not wait two years to indict Respondent.

In the well-reasoned opinion of the District Court of Appeal, First District, Judge Wigginton wrote of this fundamental fairness issue:

> "If the position of the appellee is sustained, it would appear that the stage would be set for a race to the courthouse to see whether a youth who commits a capital offense under the laws of Florida may escape prosecution in the criminal court by a hurry-up delinquency proceeding in the court..." State v. R. E. F. 251 So.2d 672 (Fla.App., 1971) at 675.

For the above reasons, Petitioner believes a substantial federal question exists and that this Court should decide if Petitioner's actions toward Respondent violate due process of law.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals, Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, has been forwarded to Phillip H. Elliot, Jr., Esq., Post Office Box 328, Daytona Beach, Florida 32015, and Thomas A. Goldsmith, Esq., Post Office Box 644, Telluride, Colorado 81435, via U. S. Mail, this day of May, 1974.

Raymond L. Marky
Assistant Attorney
General

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1933

ROGER FAIN,
Petitioner-Appellee,

versus

ED DUFF, Etc.,
Respondent-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(December 7, 1973)

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: Sixteen-year-old Roger Fain was arrested November 12, 1970, in Volusia County, Florida, for breaking into the home of a woman and raping her. Eleven days later Fain was adjudged delinquent by a juvenile court. Nine days after the juvenile proceedings, a grand jury returned an indictment charging Fain with the criminal offense of rape.

After the state courts of Florida rejected Fain's argument that prosecution of him for rape would violate the former jeopardy clause of the Fifth Amendment to the Constitution, Fain obtained a writ of habeas corpus from the United States District Court for the Middle District of Florida. The state now appeals the granting of the writ. We affirm.

Although this case involves complicated constitutional and statutory questions, the facts are simple and undisputed. On November 12, 1970, Roger Fain, then aged sixteen years and nine months, was arrested by Ormond Beach police officers for the alleged rape the day before of Mary Frances Oswald in Volusia County, Florida.[1] Five days later, a counselor of the juvenile court system filed a petition in juvenile court alleging that Fain was a delinquent child by reason of having assaulted and raped Mrs. Oswald.[2] On November 23, 1970, a hearing was held in the Volusia County Juvenile Court, during which an assistant state attorney appeared and urged the judge to waive jurisdiction and certify the case to the circuit court.[3] After hearing argument on this question, the judge declined to waive jurisdiction, found Fain delinquent and committed him to the Division of Youth Services for an

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[1] F.S.A. §39.03(1)(b) allows a police officer to arrest a juvenile who is "alleged to have committed a violation of law."

[2] F.S.A. §39.05 specifies procedures for filing petitions "in the interest of" juveniles in juvenile courts.

[3] F.S.A. §39.09 prescribes procedures for juvenile court hearings. F.S.A. §39.02(6)(a) provides that a juvenile court judge may, after a hearing, transfer a child who is 14 years of age or older to the court which would have jurisdiction over the child if he were an adult. The decision to waive jurisdiction is, by implication, left in the discretion of the juvenile court judge.

indeterminate period not to extend beyond his 21st birthday.[4] Since November 23, 1970, Fain has remained in the custody of the Division of Youth Services at the Dozier School for Boys.

On December 1, 1970, the state attorney for the Seventh Judicial Circuit urged the juvenile court judge to stay the issuance or execution of its order of commitment; the judge did not do so. The next day, an indictment was returned alleging the same acts on which the delinquency adjudication was based.[5] Two weeks later, on December 17, 1970, the state attorney urged the juvenile court to relinquish jurisdiction.[6]

In the circuit court, Circuit Judge Melton of the Seventh Judicial Circuit, dismissed the indictment against

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[4]F.S.A. §39.01(11) (in effect at the time these events occurred) defined the term "delinquent child" as follows:

> "Delinquent child" means a child who commits a violation of law, regardless of where the violation occurred, except a child who commits a juvenile traffic offense and whose case has not been transferred to the juvenile court by the court having jurisdiction.

F.S.A. §39.11(2)(b) enumerates the powers of juvenile court with respect to juveniles it has adjudged delinquent.

[5]The juvenile court petition alleged rape and aggravated assault with a dangerous weapon. The indictment charged only forcible rape, in violation of F.S.A. §794.01.

[6]F.S.A. §39.02(6)(c) provides:

> When an indictment is returned by the grand jury charging a child of any age with a violation of Florida law punishable by death, or punishable by life imprisonment, the juvenile court shall be without jurisdiction, and the charge will be made, and the child shall be handled, in every respect as if he were an adult.

Nevertheless, it is clear that the juvenile court had jurisdiction of the case when it adjudged Fain to be delinquent.

Fain on January 7, 1971, on the grounds of former jeopardy. The state appealed to the First District Court of Appeal, which reversed Judge Melton's ruling on August 17, 1971. *State* v. *R.E.F.*, 251 So. 2d 672 (1971). The Supreme Court of Florida affirmed the court of appeal, but stayed its mandate to allow Fain to pursue any remedies he might have in federal court. *R.E.F.* v. *State*, 265 So.2d 701 (1972). Fain filed a petition for a writ of habeas corpus in the Middle District of Florida, and a hearing was held before the U.S. District Court on November 21, 1972. On January 15, 1973, the district court issued the writ requested by Fain. The state filed a notice of appeal February 7, 1973.

Three questions confront us in this appeal:

1. Did the district court have jurisdiction to entertain Fain's application for a writ of habeas corpus?

2. Was the district court correct in determining that the actions of the State of Florida violate the former jeopardy clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment?[7]

3. Was the district court correct in determining that the actions of the State of Florida violate the Fourteenth Amendment and notions of fundamental fairness?

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[7]The Fifth Amendment provides, in part: ". . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

I

As in all cases in federal court, the first question to which we must address ourselves is that of jurisdiction provided by a statute, for if there is no jurisdiction, a determination of the merits of a case is futile. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). In this case, Fain asserts jurisdiction under 28 U.S.C. §2241.* We must therefore determine if that statute permits the district court to grant the writ. The statute itself contains no definition of the term habeas corpus. To ascertain its meaning and the appropriate use of the writ in federal courts, recourse must be had to the common law, from which the term was drawn. *McNally* v. *Hill*, 392 U.S. 131, 136 (1934). The traditional use of the Great Writ was to inquire into the detention of a prisoner for the purpose of commanding his release if that detention was contrary to the law. See *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970) and H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 2d.Ed. (1973), 1426-29. The purpose of this writ is not

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*28 U.S.C. §2241 provides in part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . .

(c) The writ of habeas corpus shall not extend to a prisoner unless . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

to examine the validity of any judgment, but merely to inquire into the legality of a detention. *Fay* v. *Noia*, 372 U.S. 391, 430 (1963). Thus, an obvious prerequisite to the issuance of a writ is detention, or custody.

Notwithstanding the traditional requirement that the petitioner must be in custody when the writ issues, *McNally* v. *Hill*, *supra*, the law in this country has been considerably broadened in this area. This most significant relaxation of the detention standard occurred in *Peyton* v. *Rowe*, 391 U.S. 54 (1968). In *Peyton*, the Supreme Court permitted a prisoner to attack the second of two consecutive sentences before the first had expired. Although the petitioner had not yet begun to serve the allegedly illegal sentence, the Court held that practical considerations and the history of the writ as a means of prompt adjudication permitted the district court to consider the petition at the time it was presented. *Id.* at 63.

In this case we have a situation analogous to the consecutive sentence problem of *Rowe*. Fain is now committed to the custody of the juvenile authorities, where he will remain even after he obtains the writ. But uncontested evidence introduced at the hearing in district court indicated that the conditions of his commitment would be substantially different absent the rape indictment.

Fain is now incarcerated at the Dozier School for Boys in Marianna, Florida. The Division of Youth Services, however, has the authority to release him when it would benefit Fain and society to do so. Mr. Lenox

E. Williams, superintendent of the school, testified at the hearing that, "If [Fain] could have left the institution without the threat of being thrown in jail . . .[w]e would have let him go." The district court found "that the juvenile authorities are of the opinion that petitioner has been rehabilitated and the authorities are prepared to release him but for the probability that his release from the Dozier School for Boys would simply result in his re-arrest by Volusia County authorities on the strength of the judgment of the Florida Supreme Court. [footnote omitted.]"

Thus, Fain's "custody" is even more apparent than that of *Rowe*, since the existence of the outstanding indictment not merely threatens him with more incarceration in the future, it has a substantial effect on his present circumstances. In fact, the indictment is the sole cause of his present confinement.

The fact that Fain is in the custody of the juvenile authorities of the State of Florida, coupled with the likelihood of his being released in the discretion of those authorities, convinces us that the custody requirement of §2241 has been amply complied with in this case. This holding does not in any way involve a "stretching" of the custody requirement of the statute, for Fain's liberty is restrained in a manner which can and should be basis for issuance of the writ under even the most traditional concepts of custody. Cf. *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973).

The state argues that Fain must also demonstrate that his confinement is pursuant to the judgment of

a state court.[9] But Fain nowhere alleges that his petition falls within §2254 and, in fact, it is obvious that it does not. Section 2254 was enacted to regulate the use of habeas corpus for collateral attack on state criminal proceedings. It has no relevance to this case. One of the traditional roles of the writ is to prevent lawless denials of liberty, whether perpetrated by the executive, legislative or judicial branches of the government, or the military.[10] Traditionally, the writ has had a very wide usage in testing all kinds of lawless government actions. Its use as a post-conviction remedy for wrongs perpetrated during criminal trials is relatively recent. In fact, the statute allowing federal habeas corpus attack on state criminal convictions was not even in existence prior to 1867.[11] In *Ex parte Royall*, 117 U.S. 241 (1886), Justice Harlan recognized the power of the federal court to release a prisoner who had not undergone a state trial. Although relief was denied because of a failure to exhaust the processes of the state, the case reaffirms the traditional notion that the federal remedy in habeas corpus is available to vindicate constitutional rights of citizens illegally held in custody. The Supreme Court only last term reaffirmed this traditional use of the writ. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S.

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[9]28 U.S.C. §2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[10]See H. Hart and H. Wechsler, *The Federal Courts and the Federal System*, 2d Ed. (1973), 1426-29.

[11]Judiciary Act of February 5, 1867, c.28, §1 14 Stat. 385-86.

484 (1973). In *Braden* the writ was used to enforce Kentucky's affirmative obligation to provide the petitioner with a speedy trial. Although petitioner was in custody at the time of his petition, the physical custody was that of the State of Alabama, not Kentucky, the state which petitioner alleged was depriving him of his rights. Braden obtained a writ against Kentucky officials before any trial in that state.[12]

The state also advances several arguments related to the timing of Fain's resort to a federal forum. These can be loosely grouped under the term "exhaustion." The exhaustion of state remedies requirement is based on *Ex parte Royall, supra.* Although in *Royall,* the decision to require exhaustion was left in the discretion of the district court, the requirement soon became known as a jurisdictional one. With respect to collateral attack on convictions in state court, the requirement was codified in 28 U.S.C. §2254(b), but the requirement applies to all habeas corpus actions.

The Court in *Braden* clearly explained the various foundations and rationales of the exhaustion requirement. 35 L.Ed.2d at 449-451. Briefly stated, the doctrine preserves the respective roles of state and federal governments and avoids unnecessary collisions between sovereign powers. States are allowed to vindicate their

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[12]Appellant's brief may be read to question the authority of the District Court for the Middle District of Florida to adjudicate Fain's claim and the propriety of including Duff, Volusia County Sheriff, as a defendant. Both Fain and the juvenile authorities who now hold him in custody are in the Northern District. Any questions in this area are answered by *Braden, supra.*

interest in prompt and orderly administration of justice, while the federal judiciary upholds its responsibility to prevent the exercise of illegitimate authority. However, federal-state tensions should not be exacerbated by gratuitous federal interference in state criminal proceedings.

In this case, the courts of Florida have had an opportunity to promulgate a final, definitive ruling on the question involved. The Florida Supreme Court has authoritatively stated in the context of this case that in its opinion reprosecution of the petitioner will not violate his right not to be twice placed in jeopardy. 265 So.2d 701. There is nothing more for the courts of Florida to say on this issue.

It may be objected that resort to a federal forum is unnecessary because a petition for habeas corpus relief could be brought after the trial in state court, thus leaving open the possibility that a finding of not guilty in state court would make resort to federal habeas corpus unnecessary. In addition to the observation that a finding of delinquency by the juvenile court makes this possibility unlikely (though certainly not inconceivable), a more important consideration refutes this position.

Fain is not asserting merely a federal defense to a state prosecution. He is asserting a constitutional right not to be twice put in jeopardy for the same offense. Although double jeopardy (if shown) would certainly be a proper defense to assert at trial and in post-conviction proceedings, the right consists of more

than having the second conviction set aside. It consists of being protected from having to undergo the rigors and dangers of a second — illegal — trial. Double jeopardy is not a mere defense to a criminal charge; it is a right to be free from a second *prosecution*, not merely a second *punishment* for the same offense (though that is obviously included in the right.) The prohibition of the Double Jeopardy Clause is "not against being twice punished, but against being twice put in jeopardy." *United States* v. *Ball*, 163 U.S. 662, 669 (1896), *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874), *Green* v. *United States*, 355 U.S. 184, 187 (1957).

Again, this can be analogized to *Braden*. The writ in *Braden* issued to enforce petitioner's right to a speedy trial. Surely, as the Court noted, lack of a speedy trial would have been a defense to be presented at trial, on appeal, or in post-conviction proceedings. Nevertheless, the Court approved the writ to enforce the state's affirmative obligation to bring Braden to trial. Here, it is not an affirmative obligation Fain seeks to enforce, it is a prohibition. But just as in the case of speedy trial, the right is one which can and should be vindicated without waiting until the state decides to conduct a trial. For Fain, it is the right to be left alone which he seeks to enforce against the State of Florida.

II

We turn now to the question of whether prosecuting Fain for rape violates his rights under the Constitution. Fain argues that he was not only placed in jeopardy

in the juvenile court — he was convicted and punished. His is a plea of *autrefois convict*. To try him again would not only subject him to the harrassment of an additional judicial proceeding, but also subject him to the risk of being twice punished for the same offense. Therefore, reprosecution of him as an adult violates both conceptions of fundamental fairness and the Constitution's protection against double jeopardy, made applicable in state proceedings by the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969). The State of Florida contends (1) since the juvenile proceedings were not criminal in nature, Fain was never put in jeopardy; (2) even if the juvenile proceedings are held to have placed Fain in jeopardy, as a juvenile, he has no right not to be placed in jeopardy again; and (3) the correct standard to apply is fundamental fairness, and it is not fundamentally unfair to prosecute Fain as an adult for the rape.

A. Was Fain placed in jeopardy in the juvenile court proceedings?

It cannot be disputed that a juvenile court judge in Florida may, by finding a juvenile to be delinquent, impose significant restrictions on his liberty. He may "Place a child . . . under the supervision of an authorized agent of the division of youth services . . . Commit the child to a . . . child-caring institution . . . Commit the child to the division of youth services . . . ." F.S.A. §39.11. Although commitment to the Division of Youth Services may result in the juvenile being allowed to return to his home, it may also result in incarceration until age 21. Fain's commitment to the

division resulted from his having been found delinquent. And his being found delinquent resulted from his having violated a criminal law of the State of Florida. F.S.A. §39.01(9). Thus, a violation of the criminal law may directly result in incarceration. This is a classic example of "jeopardy."

The state's argument that the purpose of the commitment is rehabilitative and not punitive does not change its nature. No authority need be cited for the proposition that a court should look past the labels to the substance of an action. Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation. A court proceeding which may result in incarceration places a person, adult or juvenile, in jeopardy. *United States* v. *Dickerson*, (D.D.C., 1958) 168 F.Supp. 899, rev'd on other grounds, (D.C.Cir., 1959) 271 F.2d 487, *M.* v. *Superior Court of Shasta County*, 4 Cal. 3d 370, 482 P.2d 664 ( ).

B. Does Fain's status as a juvenile prevent him from asserting double jeopardy as a defense to the criminal prosecution for rape?

The state argues that in *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), the Supreme Court held that juveniles are not protected by all the guarantees of the Bill of Rights, but rather, the applicable standard to use in juvenile cases is one of fundamental fairness.

403 U.S. at 543. This argument completely misconstrues the holding in *McKeiver*. The Court there dealt only with the rights of juveniles in juvenile court proceedings. Here we have a juvenile threatened with a criminal prosecution. By indicting him, the state has *expressed a desire to treat* him in all respects as an adult. Is there any question that since the state now proposes to subject him to the powers of the state as it would an adult, it must now accord him all the procedural rights that an adult has?

Fain's mere status as a juvenile, although it may subject him to the jurisdiction of an entirely different court system, cannot deprive him of rights that adults enjoy in the criminal justice system. If Florida wants to punish Fain as an adult, it must give him all the rights of an adult. We need not deal at all with Fain's rights in the juvenile court system, for now he is in the adult court system. And in that system, the Constitution's command that no person shall be twice placed in jeopardy for the same offense unquestionably applies.

C. Is Fain being placed in jeopardy for "the same offense" by the rape indictment?

In this inquiry we are guided by an earlier decision of this court in a similar case. In *Hultin* v. *Beto*, 396 F.2d 216 (1968), this court held that the State of Texas violated notions of fundamental fairness by punishing a person for a crime after it had already committed him to juvenile authorities because he committed the same *acts* which the indictment charged. Here, as in

Hultin, the indictment charged that the defendant engaged in exactly the same actions which were proved at the hearing in juvenile court, and which the judge considered in committing the juvenile in the earlier proceedings. In this case it is especially clear that Fain is being prosecuted for "the same offense," because he was adjudged delinquent by reason of having violated the same criminal law for which he is not being indicted. This is even a clearer case than *Waller* v. *Florida*, 397 U.S. 387 (1970), in which the Court held that for a State and a municipality to both prosecute someone for committing the same acts violates the double jeopardy clause. Here, we have not only the same sovereign, we have in addition exactly the same acts being punished and exactly the same elements in each offense. Thus, Fain is now being prosecuted for the "same offense" for which he was adjudged delinquent in the juvenile proceedings.

III

Does prosecution of Fain as an adult for the substantive criminal offense of rape violate notions of "fundamental fairness"?

This court's opinion in *Hultin* v. *Beto*, *supra*, provides definitive guidance in answering this question. We merely follow *Hultin* in answering in the affirmative. Florida argues that *Hultin* is distinguishable on the grounds that the Texas statute forbade prosecution of juveniles for substantive offenses, while in Florida concurrent jurisdiction exists. Thus, Texas had to wait until Hultin reached age 17 before prosecuting him.

If the timing had been different, Fain could have been prosecuted immediately as an adult, in which case the juvenile court would have lost jurisdiction over him. F.S.A. §39.02(6)(c).

We find this distinction unpersuasive. The problem in this case is that Florida failed to indict Fain before the juvenile court judge adjudged him delinquent. That it could deprive the juvenile court of jurisdiction in some other case in which it acted more quickly is of no consequence in a case in which it failed to do so.

Florida also argues that it made every effort to bring Fain to trial as an adult, while in *Hultin*, the state participated fully in the delinquency proceedings. This argument fails for two reasons. First, in *Hultin*, as in *Fain*, the state attorney objected to the juvenile court judge's action in taking jurisdiction over the juvenile. More importantly, the juvenile court judge acts for the state, just as the state attorney does. It cannot be seriously contended that the state played no role in the delinquency proceedings. Everything about the delinquency proceedings was controlled and authorized by state statutes. The juvenile court judge may have acted without the consent of the state attorney's office, but under existing Florida law, such an action was proper. The state participated in the delinquency proceedings in this case, just as it did in *Hultin*.

Finally, the state contends that the juvenile court judge abused his discretion in finding Fain delinquent after the state attorney informed the judge of his desire to present the case to a grand jury. Under existing

Florida law, however, the decision to take jurisdiction over felonies committed by juveniles is left entirely in the discretion of the juvenile court judge. There is nothing to indicate that the judge need even hear the arguments of the state attorney before making his decision, much less be bound by those arguments. It is true that the juvenile court loses jurisdiction over a juvenile after an indictment is handed down. But in this case an indictment was not handed down until after the juvenile court had invoked jurisdiction and committed Fain to the department of youth services. The court had jurisdiction over Fain when it made that commitment, and we are unconvinced that any improper procedures were engaged in to deprive the state of any interest it may have had in prosecuting Fain as an adult.

The foregoing discussion demonstrates that Fain was placed in jeopardy in the juvenile court proceedings, and that he is now placed in jeopardy again in the Circuit Court for the Seventh Judicial Circuit for the same offense. The Constitution does not permit such an action to occur.

AFFIRMED.

AINSWORTH, Circuit Judge, dissenting:

The well-reasoned opinion of the Florida Court of Appeal, First District (Wiggington, J.), 251 So.2d 672, in this matter, affirmed by the Supreme Court of Florida, 265 So.2d 701, which denied the double jeopardy plea and held that there was no denial of fundamental

fairness to the minor herein, fully reflects my views and my reasons for dissent.

Some pertinent excerpts from Judge Wiggington's opinion for the Court follow:

> F.S. Section 39.02(6) (a), F.S.A., of the juvenile court act permissively authorizes a juvenile judge to waive its jurisdiction of a proceeding brought against a juvenile 14 years of age or older if the act forming the basis for the child's alleged delinquency would constitute a felony under the laws of Florida. In this event the juvenile court shall certify the case to the court which would have jurisdiction of the child if he were an adult. F.S. Section 39.02(6) (c), F.S.A., provides that when an indictment is returned by the grand jury charging a child of any age with a violation of Florida law punishable by death or by life imprisonment, the juvenile court shall be without jurisdiction, and the child shall be handled in every respect as if he were an adult.
>
> Appellant invites the court's attention to the fact that the juvenile court in the case sub judice held a hearing, refused to relinquish jurisdiction and adjudged appellee to be a delinquent child within the short period of six days from the date on which the petition of the juvenile counselor was filed in the court. Although the indictment in this case was returned by the grand jury within 12 days there-

after, had the indictment been returned prior to the date on which the juvenile court adjudged appellee to be a delinquent child and committed him to the Division of Youth Services of the State of Florida, then the juvenile court would have lost jurisdiction of the case by virtue of the provisions of F.S. Section 39.02(6) (c), F.S.A. If the position of the appellee is sustained, it would appear that the stage would then be set for a race to the courthouse to see whether a child who commits a capital offense under the laws of Florida may escape prosecution in the criminal court by a hurry-up delinquency proceeding in the juvenile court in which he pleads guilty or enters no objection to an adjudication finding him to be a delinquent child because of the criminal offense which he committed. If such maneuver can be successfully accomplished, then under the theory advanced by appellee the child may never be subsequently prosecuted in the criminal court for the offense he has committed even though the period of time he may be lawfully confined in the custody of the Division of Youth Services may not go beyond his 21st year of age.

Id. at 675.

It is of significance here that in *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 541, 91 S.Ct. 1976, 1984 (1971), the Supreme Court said that "the juvenile court proceeding has not yet been held to be a 'criminal prosecu-

tion'." Though there are definite criminal aspects to child delinquency proceedings, the 16-year-old juvenile here has never been tried by any court for the serious capital offense of rape. It is true that the juvenile was adjudicated a delinquent by the Florida Juvenile Court on the basis of the same facts upon which he was subsequently indicted for a felony, but it cannot properly be held that the delinquency proceeding constituted a criminal prosecution so as to prevent trial of the felony case in the proper Florida state court. The majority's attempt to distinguish the holding in *McKeiver* is unconvincing.

The citation by the majority of *Hultin* v. *Beto*, 5 Cir., 1968, 396 F.2d 216, is clearly inapposite as Judge Wiggington's opinion demonstrates. Hultin, a 16-year-old minor, was adjudged a delinquent child for an assault and a murder. Under the law of Texas, where the offenses occurred, no minor may be tried for a criminal offense unless he has attained the age of 17. The attempt of the State of Texas to prosecute Hultin for murder when he thereafter attained the age of 17 was obviously contrary to law and violated principles of fundamental fairness. On the other hand, in Florida, a minor, 14 years of age or older, may be tried for any felony if the juvenile court relinquishes jurisdiction, or a child of any age may be tried for a capital case and upon indictment the juvenile court loses jurisdiction.

The Florida Court of Appeal aptly said in the conclusion of its opinion in this case:

> We find nothing in the record before us which can reasonably be said to support the conclusion reached by the trial court that to now require appellee to answer for the offense with which he is charged in the indictment would constitute fundamental unfairness. The juvenile court adjudication finding him to be a delinquent child for having committed the offense of rape was undergirded by his full cooperation and resulted from his own urging over the timely objection of the criminal court authorities. If he was sufficiently mature at age 16 to feloniously assault and forcibly rape a mature woman, it would appear that he was sufficiently mature to have appreciated the unlawful character of his act and is sufficiently responsible to answer for its consequences. To make this requirement of appellee would not, in the words of the federal court in Hultin, supra, "violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".

Id. at 680.

I agree with the Florida appellate courts which had all the facts and circumstances of this case before them, that the minor has not been denied fundamental fairness and his plea of double jeopardy should be denied.[1]

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[1]The double jeopardy issue involved in this case has been before several state courts that have denied the plea under circumstances similar to those here. *See, e.g.*, Johnson v. State,

238 A. 2d 286 (Md. Ct. Spec. App. 1967); Moquin v. State, 140 A. 2d 914 (Md. 1958); In re Santillanes, 138 P. 2d 503, 510-11 (N. M. 1943); People v. Silverstein, 262 P. 2d 656 (Cal. D. Ct. App. 1953); In re Smith, 114 N. Y. S. 2d 673 (Dom. Rel. Ct. 1952). *See also* In re Holmes, 379 Pa. 599, 109 A. 2d 523 (1954), *cert. denied*, 348 U. S. 973, 75 S. Ct. 535 (1955); State v. Smith, 25 N. W. 2d 270 (N. D. 1946); In re McDonald, 153 A. 2d 651 (D. C. Mun. Ct. App. 1959); Dearing v. State, 151 Tex. Crim. Rep. 6, 204 S. W. 2d 983 (1947).

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROGER FAIN,

Petitioner,

-vs-

No. 72-604-Civ-J-M

ED DUFF, as Volusia County Sheriff, and O. J. Keller, as Director of Division of Youth Services of Florida,

Respondents.

O R D E R

In 1970, petitioner Roger Fain, on account of certain misconduct, was adjudged a delinquent by Florida authorities competent to make such an adjudication. Shortly thereafter, an indictment for rape was returned against petitioner alleging the same acts on which the delinquency adjudication had been predicated. When the identity of the facts was pointed out to the trial judge; he dismissed the indictment. The State appealed to the First District Court of Appeals,[1] which reversed the trial court. The Supreme Court of Florida heard the question on the merits and affirmed the judgment of the First District Court of Appeals,[2] but stayed its mandate until this Court might act.

Meanwhile, petitioner has been in the custody of juvenile authorities pursuant to his being adjudicated delinquent, and is presently held at Marianna, Florida, in the Northern District. At the hearing in this cause,

the testimony of Mr. Lenox E. Williams, Superintendent of the Dozier School for Boys, established that the juvenile authorities are of the opinion that petitioner has been rehabilitated and the authorities are prepared to release him but for the probability that his release from the Dozier School for Boys would simply result in his re-arrest by Volusia County authorities on the strength of the judgment of the Florida Supreme Court.[3] While it is true, as a technical matter, that the rape indictment is not outstanding so long as the Supreme Court of Florida's stay is in force, this circumstance in no way alters the fact that but for the indictment, waiting only a ministerial act to become effective, petitioner would be a free man.[4]

This Court's analysis commences with the axiomatic proposition that the central office of the writ of habeas corpus is to test the legality of a prisoner's present restraint. Walker v. Wainwright, 390 U.S. 335 (1968). The present case is analogous to the case where a person, in custody under one conviction and sentence, challenges another conviction and sentence that is to commence in the future. See e.g. Peyton v. Rowe, 391 U.S. 54 (1968). In those cases, the authorities who are to take custody in futuro lodge a detainer with the authorities who have actual custody, and habeas jurisdiction arises because of the more stringent quality of present custody attributable to further incarceration anticipated elsewhere. In the present case, the testimony of Mr. Williams has established the same necessary link

between petitioner's present status and anticipated incarceration elsewhere that the lodging of the detainer establishes in the Peyton line of cases. Of course, in the present case it is not merely the quality but the very existence of custody that is attributable to anticipated incarceration.

The present case is also highly unusual in that it is pretrial custody rather than an imposition of sentence that faces petitioner, and accounts for his present confinement. This difference is immaterial, however, both to the custody aspect of the case and to the question of exhaustion with which every state prisoner habeas case must deal. 28 U.S.C. §2254(b); Picard v. Connor, 404 U.S. 270 (1971). This is for the obvious reason that the trial court's ruling dismissing the indictment has permitted exhaustion of what is, in other circumstances, normally an interlocutory question. The "remedies available in the courts of the State," 28 U.S.C. §2254(b), have been exhausted and the only argument to the contrary is the very strained one that the State appellate courts might reverse themselves on appeal from final conviction, a course that has been foreclosed unless the State appellate courts should overrule very recent precedent they have unamiously laid down. Moreover, it is clear that the federal system is designed principally to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' constitutional rights, and not for such speculative possibilities as respondents suggest.

Fay v. Noia, 372 U.S. 391, 438 (1963). Since the State of Florida has had this initial opportunity, the exhaustion requirement of 28 U.S.C. §2254(b) has been satisfied. Accord Wilwording v. Swenson, 404 U.S. 249 (1971).

The respondents have taken the position that, conceding jurisdiction in some federal district court, the only district court that has jurisdiction is the District Court for the Northern District of Florida, where petitioner is presently physically detained. Respondents have not taken the position that, if this Court determines that it has jurisdiction, venue might more properly be laid in the Northern District. Nor could they do so, because the only person from Marianna, Florida, whose presence was necessary at the hearing before this Court, Mr. Williams, appeared voluntarily, no subpoena having been issued. Any venue argument must, moreover, ring hollow at this point in the proceedings, since a full evidentiary hearing, for which everyone has appeared, has been already held. But this is not respondents' position. Rather, they assert that under the authority of Ahrens v. Clark, 335 U.S. 188 (1948), the "prisoner must be within the territorial jurisdiction of the District Court in order to obtain from it a writ of habeas corpus." Id. at 191. This rule, which the dissent in Ahrens characterized as cutting "sweepingly at the roots of individual freedom," is not applicable here. See 28 U.S.C. §2241(d) as amended; and Peyton v. Rowe, supra. Accord Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969 en banc).

The Supreme Court in Ahrens construed 28 U.S.C. §2241(a), "within their respective jurisdictions," as limiting the power of the federal district courts to grant writs of habeas corpus to only those petitioners confined within their territorial jurisdiction. (emphasis provided). However, Congress in 1966, expanded the jurisdictional grant of 28 U.S.C. §2241 by adding subsection (d), which vests jurisdiction in the district court not only where petitioner is confined, but also where he has been convicted and sentenced. See Act of September 19, 1966, Pub. L. 89-590; 80 Stat. 811, amending 28 U.S.C. §2241 (1948).[5]

Respondents, however, further assert that since petitioner is confined in the Northern District of Florida, and that since petitioner has not been sentenced and convicted by a state court within the Middle District of Florida, 28 U.S.C. §2241(d) does not provide this Court with jurisdiction of the case. In effect, respondents submit that petitioner has only one forum to present his petition, that being the geographical district where petitioner is presently confined. This is simply on account of the fact that petitioner is challenging his present restraint which is caused not by any conviction and sentence but by pretrial proceedings.

This Court does not restrict 28 U.S.C. §2241(d) to such a narrow and formalistic construction. Cf. Jones v. Cunningham, 371 U.S. 236 (1963). (liberal reading of "custody" within the meaning of 28 U.S.C. §2241). The

intent of Congress when it enacted Section 2241(d) was to fairly distribute the workload between the federal districts in a multi-district state, clearly in accord with the purpose of 28 U.S.C. §2255. Act of September 19, 1966, Pub. L. 89-590, Legislative History at 2968. With this purpose in mind, and in view of the function of the Great Writ, which is to provide a prompt and efficacious remedy for whatever intolerable restraints the United States Constitution forbids, this Court does not consider it appropriate to limit jurisdiction under Section 2241(d) to post-trial inquiries. As ennuciated by the Supreme Court in Fay v. Noia, supra, at 418, citing Cook v. Hart, 146 U.S. 183, 194 (1892).

> ". . . [w]hile the Federal Courts have the power and may discharge the accused in advance of his trial, if he is restrained of his liberty in violation of the Federal Constitution or laws, . . . the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged."

Since the exhaustion requirement of 28 U.S.C. §2254 has been satisfied in the present case, habeas inquiries can be appropriately extended to claims attacking restraints based on pretrial proceedings. Cf. Smith v. Hooey, 393 U.S. 374 (1960). (right to speedy trial). This Court's approach is clearly in line with the Supreme Court's policy that state prisoners seeking federal habeas corpus relief after exhausting state court remedies should be able to do so at the earliest practicable time. Peyton v. Rowe, supra. See Carafas v. LaVallee, 391 U.S. 234 (1968). With this in mind, the Court now proceeds to an adjudication on the merits.

Respondents primarily assert that an adjudication by a juvenile court in which a child is adjudged a delinquent is not tantamount to a criminal conviction in adult court; and since a juvenile adjudication is not a criminal proceeding, jeopardy there does not attach. Therefore, respondents argue, an indictment returned against petitioner charging him with the same acts on which the delinquency adjudication had been predicated is not either fundamentally unfair or proscribed by the double jeopardy clause of the United States Constitution.

In addition, respondents contend that the present case is distinguishable from Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968), wherein the Fifth Circuit held that an indictment, trial, and conviction of a person, which is based on the same acts for which he had previously been adjudged a delinquent child and confined in a state boys' school, violated fundamental fairness and therefore constituted a deprivation of due process. In support of their position, respondents point to the differences between the Texas Juvenile System and the Florida Juvenile System. In particular, respondents rely on Fla. Stat. §39.02 (1971), which vests the juvenile judge with the discretion to transfer a case in certain specified instances, and thus by transferring the case he waives jurisdiction and permits the State to prosecute the juvenile as an adult. Whereby in Texas, the juvenile judge is not given this discretion since no minor there can be tried for a criminal offense if he is less than 17 years of age. Respondents assert

that since the State of Florida could have prosecuted petitioner as an adult if the juvenile court would have waived jurisdiction, it should not now be precluded from doing so.[6]

The Court finds this argument unpersuasive. These noted differences in the Florida and Texas juvenile systems do not rise to the level of distinguishing this case from Hultin, supra. This Court, furthermore, holds that since petitioner is challenging an adult prosecution after a juvenile proceeding, under the authority of Benton v. Maryland, 395 U.S. 784 (1969), (double jeopardy prohibition of the fifth amendment applicable to the States through the due process clause of the fourteenth amendment), and Waller v. Florida, 397 U.S. 387 (1970), (State trial based on same acts as an earlier municipal court conviction constitutes double jeopardy) it is in violation of the double jeopardy clause for an indictment to be returned against a person charging him with the same acts on which the delinquency adjudication had been predicated. The facts in Waller show that a person who had been convicted in municipal court for violation of a municipal ordinance was then again convicted in state court for violation of a state crime which was similar to that of the municipal ordinance. The Supreme Court held that since state courts and municipal courts are both established under state authority they could not be treated as separate sovereigns; and accordingly, a "person could not lawfully be tried both by the municipal government and by the State of Florida." Id. at 395. The Court finds the ratio decidendi of Waller equally applicable here.

The fifth amendment to the United States Constitution states in pertinent part that . . ."nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, ..." Therefore, it is crystal clear that when a person is put before a juvenile court, and that court is competent to act and has the authority to threaten this person with loss of liberty, jeopardy attaches to the proceeding; and consequently, any subsequent proceeding in adult court based on the same acts which were charged in the juvenile proceeding is constitutionally impermissible. See United States v. Dickerson, 168 F.Supp. 899 (D. D.C. 1958), rev'd on other grounds, 271 F.2d 487 (D.C. Cir. 1959).

In sum, this Court believes that respondents have failed to show any sound reason why petitioner should not be afforded the protections of the double jeopardy clause. The Court fails to discern any useful purpose that can be served by exposing petitioner to a second trial based on the same acts. If a second trial were allowed, it would not only undermine the strength of our juvenile system but also the value placed on individual liberty.

Upon consideration that Mr. Lenox E. Williams, Superintendent of the Dozier School for Boys, Marianna, Florida, is of the opinion that petitioner has been rehabilitated, and therefore is prepared to release him but for the proceedings against petitioner for rape, it is

ORDERED:

1. This Court finds that it is in violation

of due process, in that it is not only fundamentally unfair, but also prohibited by the double jeopardy clause of the United States Constitution, and therefore constitutionally impermissible for petitioner to be prosecuted on the rape indictment returned by the Fall Term Grand Jury of Volusia County, Florida, on December 2,1970, which is subject only to a ministerial act before reinstatement.

2. Respondent O. J. Keller, Director of Youth Services of Florida, is directed to release petitioner forthwith from physical custody and to proceed with rehabilitative placement possibilities.

DONE AND ENTERED at Jacksonville, Florida, this 15th day of January, 1973.

s/ Wm C. McRay
Chief Judge

Copies mailed to:

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HONORABLE ROBERT L. SHEVIN, Attorney General, Capitol Building, Tallahassee, Florida

FOOTNOTES

1. State v. R.E.F., 251 So.2d 672 (1971).

2. R.E.F. v. State, 265 So.2d 701 (1972).

3. Still another prosecutorial writ - an information based on the same "transaction" - is outstanding against petitioner. But the offense is bondable and petitioner has posted bond so that he need not fear arrest for Volusia County Officials on that account - at least until after conviction.

4. It is clear that petitioner will be returned to Volusia County for trial based on the indictment unless the Florida Supreme Court reverses itself. Fla. Stat. §924.37(1) (1971) provides that "[w]hen the state appeals from an order dismissing an indictment (and the order is reversed) - the appellate court shall direct the trial court to permit the defendant to be tried on the re-instated indictment . . . ."

5. It is appropriate to note that the Fifth Circuit in Mitchell v. Henderson, 432 F.2d 435 (1970), has intimated that the purpose of 28 U.S.C. §2241(d) ". . . is to provide a more convenient forum for witnesses. Although Section 2241(d) primarily governs jurisdiction, we believe it has implications as to venue between divisions in the same district."

6. Respondents additionally argue that pursuant to Fla. Stat. §39.02(6)(c), if an indictment had been returned before the juvenile court had acted, the indictment itself would have relieved the juvenile court of jurisdiction. While recognizing this position as being correct, it is nevertheless clear to the court that when petitioner was tried in juvenile court, that court had jurisdiction and was competent to act.

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AS AMENDED

Roger FAIN, Petitioner-Appellee,

v.

Ed DUFF, etc., Respondent-Appellant.

No. 73-1933.

United States Court of Appeals,
Fifth Circuit.

March 1, 1974.

Appeal from the United States District Court for the Middle District of Florida, Robert M. McRae, Jr., Chief Judge, 364 F.Supp. 1192.

Rehearing of 488 F.2d 218 en banc denied.

Before GEWIN, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

CLARK, Circuit Judge, with whom COLEMAN, AINSWORTH and GEE, Circuit Judges, join, dissenting:

I dissent from the court's denial of rehearing en banc.

Judge Ainsworth's dissent to the panel opinion aptly puts my views on the jeopardy effect of the adjudication of delinquency.

Exceptional importance is also present because the court relies on Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), as authority for the unprecedented use of the writ of habeas corpus to prelitigate a constitutional defense to a state criminal prosecution. With deference, this not only cuts across the express caveat of the Supreme Court;[1] but it also hurls the injunctive effect of the writ of habeas corpus into the path of this *pending* State court proceeding, contrary to 28 U.S.C. § 2283 and the rationale of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Braden required a trial to be held. Today's decision converts the power to require into the power to halt.

1. We emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court. The contention in dissent that our decision converts federal habeas corpus into "a pretrial motion forum for state prisoners," wholly misapprehends today's holding.
Braden, supra, 410 U.S. at 493, 93 S.Ct. at 1129, 35 L.Ed.2d at 451.

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